

**BEFORE THE WATER RESOURCES DEPARTMENT  
OF THE  
STATE OF OREGON**

In the Matter of Instream Lease Application )	RECONSIDERATION AND
IL-992, Certificate 85385, 85384, and )	MODIFICATION OF A FINAL ORDER
85390, Deschutes County )	RECORDED IN SPECIAL ORDER
)	VOLUME 78 PAGES 317 -320
)	APPROVING INSTREAM LEASE
)	APPLICATION IL-992

**Authority**

ORS 537.348 establishes the process in which a water right holder may submit a request to lease an existing water right for instream purposes. OAR Chapter 690, Division 077 implements the statutes and provides the Department's procedures and criteria for evaluating instream lease applications.

**Lessor and Lessee**

Deschutes River Conservancy (DRC)  
P.O. Box 1560  
Bend, Oregon 97709  
[gen@deschutesriver.org](mailto:gen@deschutesriver.org)

**Findings of Fact**

1. On April 21, 2009, the DRC filed an application to lease a portion of Certificates 85385, 85384, and 85390 for instream use. The Department assigned the application number IL-992.
2. Interest in a portion of the water right to be leased instream has been conveyed from the original land owners. The lease application identifies the DRC as the interest holder in the portion of the water right to be leased. Individual conveyance agreements, along with supporting documentation, identify that interest in a portion of the right to be leased is held by the DRC. The Department has determined that the DRC is an interest holder in the right and is authorized to lease the pertinent portion of the water right instream.

3. The portion of the first right to be leased is as follows:

<b>Certificate:</b>	85385 in the name of City of Sisters and Lazy Z Meadows LLC
<b>Use:</b>	Irrigation of 25.5 acres
<b>Priority Date:</b>	1881
<b>Quantity:</b>	<b>Rate:</b> 0.51 Cubic Foot per Second (CFS)
<b>Source:</b>	Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

This is a final order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	21	SW SW	UNCLE JOHN DITCH: 140 FEET NORTH AND 1190 FEET EAST FROM THE SW CORNER OF SECTION 21

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
15 S	10 E	WM	10	NE SW	705	4.4
15 S	10 E	WM	10	NW SW	705	21.1

4. The portion of the second right to be leased is as follows:

**Certificate:** 85384 in the name of City of Sisters and Lazy Z Meadows LLC  
**Use:** Irrigation of 7.5 acres  
**Priority Date:** 1880  
**Quantity:** **Rate:** 0.154 CFS  
**Source:** Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	21	SW SW	600 FEET NORTH AND 1100 FEET EAST FROM THE SW CORNER OF SECTION 21

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
15 S	10 E	WM	10	NW SW	705	0.3
15 S	10 E	WM	10	SW SW	705	7.2

5. The portion of the third right to be leased is as follows:

**Certificate:** 85390 in the name of City of Sisters and Lazy Z Meadows LLC  
**Use:** Irrigation of 30.0 acres  
**Priority Date:** 1880  
**Quantity:** **Rate:** 0.95 CFS  
**Source:** Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	21	SW SW	UNCLE JOHN DITCH: 140 FEET NORTH AND 1190 FEET EAST FROM THE SW CORNER OF SECTION 21

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
15 S	10 E	WM	10	SW SW	705	28.4
15 S	10 E	WM	10	SE SW	705	1.6

The reconsideration request also clarified that water protected instream under Certificate 85384 is requested to be protected from the authorized POD as described in Finding of Fact #4.

11. The request for reconsideration was filed within the 60-day period specified in ORS 183.484. The Department acknowledged the applicant's request for reconsideration on August 13, 2009, and indicated that the Department would reconsider the order.
12. On reconsidering the Final Order, the Department determined that the amount of water that can be protected instream may be modified consistent with the reconsideration request submitted by the DRC without injury and enlargement provided that return flows are accounted for at River Mile 19.2. Quantities in an amount equivalent to 5.5 acre-feet per acre may be protected instream past the point of return flows without injury and enlargement.

The reconsideration request identifies a proposed instream rate of 0.96 CFS under Certificate 85390. The Department has identified that this rate should be reduced to 0.95 CFS, which is the max rate allowed, as described in Finding of Fact #5, and consistent with the original instream lease application.

13. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:  
Whychus Creek, tributary to the Deschutes River

**Instream Reach #1:** From the Uncle John Ditch POD (as described in Findings of Fact #3 and #5) to the POD for Certificate 85384 (as described in Finding of Fact #4)

Certificate	Priority Date	Period Protected Instream			
		April 15 through May 15		May 16 through October 15	
		Instream Rate (cfs)	Instream Volume (AF)	Instream Rate (cfs)	Instream Volume (AF)
85385	1881	0.51	31.36	0.51	154.77
85390	1880	0.95	58.41	0.60	182.08
<b>Total</b>		<b>1.46</b>	<b>89.77</b>	<b>1.11</b>	<b>336.85</b>

**Instream Reach #2:** From the POD for Certificate 85384 (as described in Finding of Fact #4) to River Mile 19.2

Certificate	Priority Date	Period Protected Instream			
		April 15 through May 15		May 16 through October 15	
		Instream Rate (cfs)	Instream Volume (AF)	Instream Rate (cfs)	Instream Volume (AF)
85385	1881	0.51	31.36	0.51	154.77
85390	1880	0.95	58.41	0.60	182.08
85384	1880	0.15	9.22	0.15	45.52
<b>Total</b>		<b>1.61</b>	<b>98.99</b>	<b>1.26</b>	<b>382.37</b>

6. Certificates 85385, 85384, and 85390 do not specify an irrigation season. Nor is an irrigation season specified by Basin Program or Decree. For the purposes instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream.
7. The lease application proposed to protect water instream as follows:  
Whychus Creek, tributary to the Deschutes River

**Certificate 85385**

**Instream Reach:** From the Uncle John Ditch POD (as described in Findings of Fact #3) to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
85385	1881	0.51	216.48	April 1 through October 31

**Certificate 85384**

**Instream Reach:** From the Uncle John Ditch POD (as described in Findings of Fact #3) to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
85384	1880	0.154	65.57	April 1 through October 31

**Certificate 85390**

**Instream Reach:** From the Uncle John Ditch POD (as described in Findings of Fact #5) to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
85390	1880	0.95	403.24	April 1 through October 31

8. The lease application includes the information required under OAR 690-077-0076(3). The Department provided notice of the lease application pursuant to OAR 690-077-0077(1). No comments were received.
9. On July 13, 2009, a Final Order was issued approving Instream Lease Application IL-992, as evidenced by Special Order Volume 78, Page 317. The rights proposed to be leased instream do not have a duty (seasonal volume) limitation. The Final Order limited the amount of water that could be protected instream under each right to the equivalent of 5.5 acre-feet per acre to prevent injury or enlargement and reduced the instream rates to protect water over the full period requested.
10. On August 11, 2009, the Department received a request from the DRC that the order be reconsidered. The request indicated that the amount protected instream should not be limited and that the full amount allowed under each right should be protected instream to the point of return flows. Based on discussions with the Department's Watermaster and South Central Region Manager, the DRC included with their reconsideration request a modified proposal for protection of instream flows under this lease application.

**Instream Reach #3: From River Mile 19.2 to the mouth of Whychus Creek**

Certificate	Priority Date	Period Protected Instream	
		April 15 through October 15	
		Instream Rate (cfs)	Instream Volume (AF)
85385	1881	0.383	140.25
85390	1880	0.450	165.0
85384	1880	0.113	41.25
<b>Total</b>		<b>0.946</b>	<b>346.5</b>

14. This instream lease is not reasonably expected to significantly affect land use as prescribed by ORS 197.180, OAR Chapter 660, Divisions 30 and 31, and OAR Chapter 690, Division 5.
15. Based upon review of the application, comments received, information provided by the Department's Watermaster, and other available information, the Department finds that the lease will not result in injury or enlargement. This finding is made through an abbreviated review recognizing that the lease may be modified or revoked under OAR 690-077-0077 if the Department later finds that the lease is causing injury to any existing water right or enlargement of the original right.
16. If a right which has been leased is later proposed to be leased again or transferred to an instream use under ORS 537.348 and OAR 690-077-0070 or OAR 690-077-0075 a new injury review shall be required. Transfers will be subject to a full and complete review to determine consistency with the requirements of OAR Chapter 690, Division 380 and Division 077. Approval of this lease does not establish a precedent for approval of future leases or transfers.
17. The Lessor has requested that the lease terminate on October 31, 2013.
18. The Lessor has requested the option of terminating the lease early with written notice to the Department.

**CONCLUSIONS OF LAW**

The Department concludes that the lease as modified will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

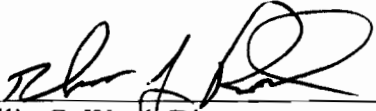
**ORDER**

Therefore, it is ORDERED:

1. The Final Order approving instream lease application IL-992 and entered at Special Order Volume 78, Pages 317 to 320 is withdrawn. The Instream Lease is modified and APPROVED as described herein and issued with a new Special Order Volume and Page.
2. The former place of use will no longer receive water as part of these rights, any supplemental rights, or any other layered water rights for irrigation use, including ground water registrations during the term of the lease.
3. The lease will terminate on October 31, 2013. For multiyear leases, the Lessor *shall* have the option of terminating the lease each year with written notice to the Department. The lease

may be terminated at any time during the calendar year. However, if the termination request is received less than 30-days prior to the period of allowed instream use (April 1) or after the period of allowed use has begun for the water right(s) being leased, water shall not be used under the right(s) leased until the following calendar year, unless the Director determines that enlargement would not occur.

Dated at Salem, Oregon this 24<sup>th</sup> day of August, 2009.

  
for Phillip C. Ward, Director

Mailing date: AUG 26 2009